UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANGELA H. PIERCE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 04-15-P-H***
	)	
SEARS, ROEBUCK	***)***	
AND COMPANY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

In this employment-discrimination action, defendant Sears, Roebuck and Company ("Sears") moves for summary judgment as to all of plaintiff and former employee Angela H. Pierce's claims against it. *See generally* Defendant's Motion for Summary Judgment, etc. ("Defendant's S/J Motion") (Docket No. 16). For the reasons that follow, I recommend that the court grant in part and deny in part Sears' motion.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v.*

Pfizer Corp., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id*. The nonmoving party must then submit a responsive "separate, short, and concise" statement of material facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id*. The nonmoving party may also submit its

own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id*. The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id*.

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id*.; *see also, e.g.*, *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted." (citations and internal punctuation omitted).

II. Factual Context

The parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to Pierce as nonmovant, reveal the following relevant to this recommended decision:[1]

[1] At various points, both Sears and Pierce support their statements of material facts with citations to *other* statements of (*continued on next page*)

In January 1998, Sears hired Pierce to work in an hourly position in the Fine Jewelry Department at its South Portland, Maine store. Defendant's Statement of Material Facts as to Which There Is No Genuine Issue ("Defendant's SMF") (Docket No. 17) ¶ 1; Plaintiff's Opposing Statement of Material Facts and Plaintiff's Additional Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 25) ¶ 1. Prior to her employment with Sears, Pierce spent five years as a store manager for Claire's Stores Incorporated ("Claire's"). Plaintiff's Additional Statement of Material Facts ("Plaintiff's Additional SMF"), commencing at page 12 of Plaintiff's Opposing SMF, ¶ 1; Declaration of Angela H. Pierce ("Pierce Decl."), Attachment No. 1 to Plaintiff's Opposing SMF, ¶ 1. In 1995, Pierce was named Outstanding Store Manager of the Year for the Northeast Region, which at the time had approximately 1,000 stores. *Id*. Also in 1995, Pierce was promoted to the Claire's store at the Maine Mall in South Portland. Plaintiff's Additional SMF ¶ 2; Pierce Decl. ¶ 2. For that fiscal year she received awards for being the manager of a top ten store in the entire company. *Id*. In 1997 she was promoted to district training manager. Plaintiff's Additional SMF ¶ 3; Pierce Decl. ¶ 3. She was responsible for coaching and training all new managers who entered the district. *Id*. She also visited the stores to help existing managers develop their coaching plans and build strong teams. *Id*.[2]

material facts in addition to, or in lieu of, providing record citations as required by Local Rule 56. I have disregarded all such improper citations. It follows that, to the extent a statement of material facts is buttressed solely by such impermissible citations, I have disregarded the statement in its entirety.

[2] Sears' objection to paragraphs 1-3 of the Plaintiff's Additional SMF on the ground of irrelevance, *see* Defendant's Amended Opposition to Plaintiff's Statement of Additional Facts ("Defendant's Reply SMF/Additional") (Docket No. 30) ¶¶ 1-3, is overruled. Sears alternatively qualifies these three paragraphs, *see id*., by asserting that (i) Pierce testified at her deposition that she left her store-manager position at Claire's to work in the jewelry department at Sears because she "felt like [she] needed to go get a career instead of just a job," Deposition of Angela H. Pierce ("Pierce Dep."), Attachment Nos. 9-10 to Defendant's SMF, at 161, and (ii) Claire's is a small accessories store aimed at "teens and tweens" that bears little, if any, relation to Sears' retail management world, *see* Second Declaration of Ralph Fournier ("Second Fournier Decl."), Attachment No. 1 to Defendant's Reply to Plaintiff's Opposing Statement of Material Facts (Docket No. 28), ¶ 3 & Exh. A thereto.

In October 1998, Sears made Pierce an Assistant Manager, which was another hourly position in the Home Improvement Department in its South Portland store. Defendant's SMF ¶ 2; Plaintiff's Opposing SMF ¶ 2. In that position, Pierce worked directly for Susan Sughrue, who has worked for Sears for twenty-two years and was the manager of the Home Improvement Department at the South Portland store from 1997 until April 2001. *Id*. ¶ 3. Sughrue, whose position was salaried, was responsible for all departments within the Home Improvement Department, including the Lawn and Garden, Sporting Goods, Paint and Hardware departments. *Id*. ¶ 4.

In August 2000 Ralph Fournier, who has worked for Sears since 1970, became the Store General Manager of the South Portland store. *Id*. ¶ 5. From 1993 until 2000 he had been the Store General Manager of Sears' Brunswick, Maine store. *Id*. ¶ 6. As a Store General Manager, his duties included sales and profits, "total customer shopping experience" and visual-presentation standards for the entire store. *Id*. ¶ 7. He was responsible for the entire staff of the store, and all salaried managers at the store reported directly to him. *Id*.

From 1993 until October 2001 Kathy Schumm, who has worked for Sears for almost thirty-five years, was the District General Manager of the district in which the South Portland store is located and was responsible for overseeing the sales, profits and customer-service levels of all stores in that district. *Id*. ¶ 81. Chris James was the District General Merchant for Home Improvement, Defendant's SMF ¶ 11; Declaration of Chris James ("James Decl."), Attachment No. 13 to Defendant's SMF, ¶ 2, a position that he held until October 2001, Defendant's SMF ¶ 85; Plaintiff's Opposing SMF ¶ 85. Durwood ("Butch") Turner, who has been with Sears for more than twenty-six years, was the human-resources manager for the district. Defendant's SMF ¶ 87; Plaintiff's Opposing SMF ¶ 87.

Three months after being hired by Sears in 1998, Pierce was chosen by then-store manager Dick Grimes to attend a four-day seminar in Albany, New York, titled "Fundamentals of Management." Plaintiff's Additional SMF ¶ 5; Pierce Decl. ¶ 4.[3] Shortly after being promoted to Assistant Manager, Pierce overheard another Assistant Manager talking about the Sears management-training program. Plaintiff's Additional SMF ¶ 6; Pierce Decl. ¶ 6. She spoke with Grimes and asked if he would recommend her for the program. *Id*. He told her that because of her management background and her scores from the training in Albany it would not be necessary for her to attend such training. *Id*.[4] While working as Sughrue's Assistant Manager, Pierce received very high scores on her evaluations. Plaintiff's Additional SMF ¶ 7; Pierce Decl. ¶ 7. She received her highest marks in the areas of customer service, ownership and teamwork. *Id*. In her last annual review she received the highest score attainable, a 5, in the area of customer satisfaction. Plaintiff's Additional SMF ¶ 7; Pierce Decl. ¶ 8.[5] During her tenure as Assistant Manager, Pierce never received any document or written evaluation criticizing her in coaching or delegation or showing evidence of deficiency or need for corrective action. Plaintiff's Additional SMF ¶ 8; Pierce Decl. ¶ 9.[6] During her tenure as Assistant Manager, Pierce was involved in coaching and training sales

[3] Sears purports to qualify this paragraph; however, its qualification is unsupported by any record citation and is on that basis disregarded. *See* Defendant's Reply SMF/Additional ¶ 5.

[4] Sears' objection to paragraph 6 of the Plaintiff's Additional SMF on the basis that it contains inadmissible hearsay, *see* Defendant's Reply SMF/Additional ¶ 6, is overruled. Inasmuch as appears, the statement is offered to illustrate Pierce's understanding rather than to prove the truth of the matter asserted. However, even assuming *arguendo* that it is offered for the truth of the matter asserted, it qualifies as an admission by a party-opponent pursuant to Fed. R. Evid. 801(d)(2)(D) ("a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship").

[5] Pierce's further assertion that during this period Sughrue provided no specific criticisms regarding coaching, delegating, customer-service issues or sales-team management, *see* Plaintiff's Additional SMF ¶ 7, is disregarded inasmuch as it is unsupported by the citations given. Sears denies paragraph 7 in its entirety, *see* Defendant's Reply SMF/Additional ¶ 7; however, I view the cognizable evidence in the light most favorable to Pierce.

[6] Sears denies this statement, *see* Defendant's Reply SMF/Additional ¶ 8; however, I view the cognizable evidence in the light most favorable to Pierce.

associates not only in her department but also in the entire store. Plaintiff's Additional SMF ¶ 9; Pierce Decl. ¶ 10.[7]

When Pierce worked as Sughrue's assistant, Sughrue felt that she was "for the most part a good employee" and that she was a good assistant but that her weaknesses included that she was not able to maintain focus on projects, got bogged down with customer issues and was too friendly with the sales associates she supervised. Defendant's SMF ¶ 8; Deposition of Susan Sughrue ("Sughrue Dep."), Attachment No. 12 to Defendant's SMF, at 7-8, 16.[8] During the period of time that Pierce worked as Sughrue's assistant, Sughrue discussed her weaknesses with Fournier in the context of Fournier's consideration of the possibility of promoting associates within the store. Defendant's SMF ¶ 9; Sughrue Dep. at 17-19.[9]

In April 2001 Sughrue left the South Portland store to become the In-Store Marketing Manager of Sears' Newington store. Defendant's SMF ¶ 10; Plaintiff's Opposing SMF ¶ 10. When Sughrue left the South Portland store, she thought that having Pierce replace her as manager of the entire Home Improvement Department would be a "big jump" for Pierce. *Id*. ¶ 12. Even now, Sughrue is not sure whether that was a position Pierce could eventually have obtained. *Id*.

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[7] Sears qualifies this paragraph, noting that during the time Fournier was Store General Manager at the South Portland store, he never had Pierce conduct any training or coaching sessions apart from her responsibilities for training and coaching the employees in her department. *See* Defendant's Reply SMF/Additional ¶ 9; Second Fournier Decl. ¶ 11.

[8] Pierce denies this statement, *see* Plaintiff's Opposing SMF ¶ 8; however, I sustain Sears' objection to her denial on the basis that it does not effectively controvert the underlying statement, *see* Defendant's Amended Reply to Plaintiff's Opposing Statement of Material Facts ("Defendant's Reply SMF/Opposing") (Docket No. 29) ¶ 8.

[9] Pierce offers a two-sentence qualification of this paragraph, *see* Plaintiff's Opposing SMF ¶ 9, to which Sears objects, *see* Defendant's Reply SMF/Opposing ¶ 9. I sustain Sears' objection to the first sentence on the basis that it is not sufficiently responsive to the underlying statement and thus should have been set forth as an additional fact. I overrule Sears' objection to the second sentence, in which Pierce asserts: "Sughrue never criticized Plaintiff or provided written documentation in her evaluations of Plaintiff to substantiate these concerns." Plaintiff's Opposing SMF ¶ 9; Pierce Decl. ¶¶ 7-9.

After Sughrue left, Pierce assumed management of the entire Home Improvement Department. Plaintiff's Additional SMF ¶ 11; Pierce Decl. ¶ 11. Pierce was told at the time that the department might be reorganized but that no decision had been made. *Id*.[10] She ran the entire department alone from April to part of June 2001 without the support of an assistant, while awaiting word whether it would be split into two or would remain one department. Plaintiff's Additional SMF ¶ 12; Pierce Decl. ¶ 12.[11]

During the month of May 2001, under Pierce's management, Home Improvement Department revenue was at "110 percent to plan." Plaintiff's Additional SMF ¶ 13; Pierce Decl. ¶ 13. Not only had Pierce exceeded Sears' 2001 "plan" for the department for the month but she also increased sales over her predecessor's May 2000 revenue by 5 percent. *Id*.[12]

In May 2001 Fournier decided to split the Home Improvement Department. Defendant's SMF ¶ 13; Plaintiff's Opposing SMF ¶ 13. He decided that Pierce would fill one sales-manager position (covering Lawn and Garden and Sporting Goods), and another Sears employee named Corey Vachon would fill the other (covering Paint and Hardware). *Id*.

In June 2001 Fournier informed Pierce that the Home Improvement Department would be split into two departments because of a desire to maintain and increase the revenue of each by more focused management. Plaintiff's Additional SMF ¶ 14; Pierce Decl. ¶ 14.[13] The Home Improvement departments

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[10] Sears denies this paragraph, *see* Defendant's Reply SMF/Additional ¶ 11; however, I view the cognizable evidence in the light most favorable to Pierce.

[11] Sears denies this paragraph, *see* Defendant's Reply SMF/Additional ¶ 12; however, I view the cognizable evidence in the light most favorable to Pierce.

[12] Sears denies this paragraph, *see* Defendant's Reply SMF/Additional ¶ 13; however, I view the cognizable evidence in the light most favorable to Pierce.

[13] Sears' objection to this paragraph on the ground that it contradicts Pierce's prior deposition testimony, *see* Defendant's Reply SMF/Additional ¶ 14, is overruled. The objection invokes the rule that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." *Morales v. A.C. Orssleff's EFTF*, 246 F.3d 32, 35 (1st Cir. 2001) (citation and internal quotation marks omitted). At her deposition, Pierce

(*continued on next page*)

had been split in this manner in two New Hampshire Sears stores (in Newington and Salem). Plaintiff's Additional SMF ¶ 15; Pierce Decl. ¶ 14.[14]

Vachon has been with Sears since October 1995, when he was hired to work part-time in an hourly position in the Paint Department at its Lewiston, Maine store. Defendant's SMF ¶ 14; Plaintiff's Opposing SMF ¶ 14. Six months later, he became a full-time sales associate in the Hardware Department at the Lewiston store. *Id*. ¶ 15. One year after becoming a full-time sales associate, he became a sales coordinator in that department – a supervisory position. *Id*. ¶ 16. As of the time Vachon obtained his first managerial job with Sears in 1998, Pierce had substantially more experience in managing retail departments, including five more years as a store manager and one year as a district manager. Plaintiff's Additional SMF ¶ 4; Pierce Decl. ¶¶ 1-3; ; Deposition of Corey Vachon ("Vachon Dep."), Attachment No. 1 to Defendant's SMF, at 8, 11-15.[15]

James worked with Vachon when James was District General Merchant for Home Improvement and Vachon worked at the Lewiston store selling tools and as a paint supervisor. Defendant's SMF ¶ 17; Plaintiff's Opposing SMF ¶ 17. When an opportunity came up at Sears' Brunswick, Maine store, James recommended Vachon, and Vachon went to work at that store as an Assistant Manager in the Home

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testified that it was her understanding "that the reason why they broke down the department in two was because of the large dollar volume, and it had been the trend in other Sears stores to do so" and that "the only conversations that [she] had with [Fournier] regarding the overseeing of the department was there [were] conversations with district on whether or not the department would be broken up based on volume and other trends in the company." Pierce Dep. at 10-12. The notion of splitting up a department based on "large dollar volume" does not clearly contradict the notion of splitting one up based on a desire to increase revenue via more focused management. Pierce's further assertion that "Fournier told Vachon this as well[,]" Plaintiff's Additional SMF ¶ 14, is disregarded on the basis that it is not supported by the citation provided. Sears alternatively denies the entirety of paragraph 14, *see* Defendant's Reply SMF/Additional ¶ 14; however, I view the cognizable evidence in the light most favorable to Pierce as nonmovant. *See also* Defendant's SMF ¶ 11; Plaintiff's Opposing SMF ¶ 11; Defendant's Reply SMF/Opposing ¶ 11.

[14] Sears qualifies this statement, asserting that those Sears stores have much greater revenue than the South Portland store. *See* Defendant's Reply SMF/Additional ¶ 15; Second Fournier Decl. ¶ 15.

[15] Sears' objection to this statement on the ground of irrelevance, *see* Defendant's Reply SMF/Additional ¶ 4, is overruled.

Improvement Department. *Id*. ¶ 18. Fournier, who at the time was the Store General Manager of Sears' Brunswick store, hired Vachon for that position. *Id*. ¶ 20. Fournier found him to have great potential. *Id*. ¶ 19. In 2000, about two years after he became an Assistant Manager in the Home Improvement Department in the Brunswick store, Vachon was promoted to the salaried position of manager of the Mens, Kids and Footwear departments, also known as Soft Lines. *Id*. ¶ 21. Vachon did not like that position, so about six to nine months later, after hearing that the position of Sales Manager of the Home Improvement Department in South Portland was open, he applied for it. *Id*. ¶ 22.

Fournier hired Vachon to be Sales Manager of the Paint and Hardware portions of the Home Improvement Department at the South Portland store, a position Vachon held for slightly more than a year. *Id*. ¶ 23. When Fournier hired Vachon for that position, he did not feel that Vachon was capable of running the entire department. *Id*. ¶ 24. However, over the next six months, he changed his opinion. *Id*. Not only did he observe Vachon's performance in South Portland, but also, more importantly, the job description changed, and the new model was a better fit for Vachon's strengths. *Id*. James also recommended Vachon for a Sears management-training program in which employees who are identified as displaying great potential and talent are developed as managers by being rotated through a number of positions to give them exposure to different aspects of the business and by receiving different kinds of management and sales training. *Id*. ¶ 25. Vachon was accepted into, and participated in, the management-training program. *Id*. ¶ 26. Pierce was not recommended for, or a part of, Sears' management-training program. Defendant's SMF ¶ 27; James Decl. ¶ 4.[16]

[16] Pierce denies this statement, *see* Plaintiff's Opposing SMF ¶ 27; however, I sustain Sears' objection to her denial on the ground that it does not effectively controvert the underlying statement, *see* Defendant's Reply SMF/Opposing ¶ 27.

Fournier believed Pierce was not a strong coach in that she was not able to turn around some bad habits in the store and she became a little too close to some employees, as a result of which it was difficult for her to manage them. Defendant's SMF ¶ 46; Deposition of Ralph Fournier ("Fournier Dep."), Attachment No. 4 to Defendant's SMF, at 27-28. He also felt that the inability to delegate work to others was another one of Pierce's weaknesses, and that her over-involvement with customer issues that could have been delegated to the associates who made the sale prevented her from spending enough time on the sales floor coaching associates. Defendant's SMF ¶ 47; Fournier Dep. at 33-34.[17]

During the summer of 2001, Fournier expressed to James his concern that Pierce spent less time dealing with selling than dealing with issues relating to deliveries or non-deliveries of items that were already sold, general returns, broken items, non-working items or items with which customers were unhappy for some other reason. Defendant's SMF ¶ 29; James Decl. ¶ 3. Fournier told James that Pierce tended to be too rigid in customer-service transactions, often sticking to her guns in interactions that took too much time when simply giving in would have been less costly to Sears in terms of time and money. Defendant's SMF ¶ 30; James Decl. ¶ 3. Fournier told James that between Pierce spending too much time on customer-service issues and overseeing inventory issues that could have been handled by someone else, she was out back more than she was on the sales floor teaching and coaching her sales associates in Sears' selling techniques. Defendant's SMF ¶ 31; James Decl. ¶ 3.[18]

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[17] Pierce denies paragraphs 46 and 47 of the Defendant's SMF, *see* Plaintiff's Opposing SMF ¶¶ 46-47; however, I sustain Sears' objection that she fails to properly controvert them, *see* Defendant's Reply SMF/Opposing ¶¶ 46-47.

[18] Pierce objects to paragraphs 29-31 of the Defendant's SMF on hearsay grounds. *See* Plaintiff's Opposing SMF ¶¶29-31. The objection is overruled. Sears plausibly explains that the statements are offered not for the truth of the matter asserted, *see* Fed. R. Evid. 801(c), but rather to illustrate James' state of mind and/or that the statement was made and its timing, *see* Defendant's Reply SMF ¶¶ 29-31. Pierce alternatively denies paragraphs 29-31, *see* Plaintiff's Opposing SMF ¶¶ 29-31; however, her statements do not effectively controvert those of Sears.

During the time Pierce was Assistant Manager of the Home Improvement Department and part of the time she was a Sales Manager of that department, Schumm, the District General Manager, visited the South Portland store about twice a month and, while there, interacted with Pierce on some occasions. Defendant's SMF ¶ 49; Plaintiff's Opposing SMF ¶ 49. Schumm considered Pierce a good and capable Assistant Manager. *Id*. ¶ 50. During the time Pierce was a Sales Manager, Schumm had concerns about (i) Pierce's associates' use of the selling process in that Pierce did not train, develop, coach or hold them accountable for sales results, and (ii) Pierce's lack of delegation to associates in that she did not supervise, educate and train them to do tasks rather than doing them herself. Defendant's SMF ¶ 51; Deposition of Kathleen Schumm ("Schumm Dep."), Attachment No. 7 to Defendant's SMF, at 20-22.[19]

On a scale used by Sears ranging from "Promotable" (the highest rating) to "At Level" to "Developing" to "Over Their Level" (the lowest rating), Schumm considered Pierce a "Developing" manager when she was a Sales Manager in the Home Improvement Department in that she was not really "carrying the load" but was "getting there" and "certainly" was not ready to be promoted. Defendant's SMF ¶ 52; Schumm Dep. at 23.[20] Schumm considered Vachon to be "Promotable" when he was a Sales Manager in the Home Improvement Department. Defendant's SMF ¶ 53; Plaintiff's Opposing SMF ¶ 53.

In late summer 2001, Sears decided to reorganize its work force nationwide, effective February 2002. Defendant's SMF ¶ 55; Plaintiff's Opposing SMF ¶ 55. The reorganization included a new staffing

[19] Pierce denies this statement, *see* Plaintiff's Opposing SMF ¶ 51; however, I sustain Sears' objection to her denial on the basis that her statements do not effectively controvert its underlying statement, *see* Defendant's Reply SMF/Opposing ¶ 51.

[20] Pierce qualifies this statement, asserting that Schumm provided no documentation in support of that testimony. *See* Plaintiff's Opposing SMF ¶ 52; Schumm Dep. at 25; Pierce Decl. ¶¶ 35-36. Sears' objection to her qualification on the ground of irrelevance, *see* Defendant's Reply SMF/Opposing ¶ 52, is overruled.

matrix based on store volume that dictated how many employees and what positions each store would have going forward, with new job descriptions for those positions. *Id*. ¶ 56. As a result of the reorganization each Sears manager and Assistant Manager nationwide had to reapply for a position with Sears. *Id*. ¶ 57. Based on the new staffing matrix, each Sears district in the nation underwent a process during which each district decided which manager would fill each new manager position. *Id*. ¶ 58. As a result of the reorganization, instead of dividing responsibility for each selling floor among a number of salaried managers and Sales Managers, the South Portland store was to divide that responsibility among fewer Assistant Store Managers. *Id*. ¶ 59. Instead of having two Sales Managers, each responsible for part of the Home Improvement Department, the South Portland store was to have one Assistant Store Manager who would be responsible for the entire department. *Id*. ¶ 60.

When Sears distributed the reorganization materials, Pierce understood that a requirement of the new organization scheme was that the Home Improvement Department was to have one manager instead of two and that this was not Fournier's idea. *Id*. ¶ 61. The new position of Assistant Store Manager of Home Improvement, like the new position of Assistant Store Manager of other departments, contemplated running a much more complex business in that there would be fewer Assistant Store Managers than there had been managers or Sales Managers prior to the reorganization, and each Assistant Store Manager would be responsible for handling a much bigger piece of the store. *Id*. ¶ 62.

Before the reorganization, the two Sales Managers in the Home Improvement Department were responsible for scheduling, "signing" (*i.e*., putting up and taking down advertising signs), liquidating merchandise, keeping track of inventory, coaching and training. *Id*. ¶ 63. After the reorganization, the manager of the Home Improvement Department was to be responsible for scheduling, coaching and training, with more emphasis on having the manager out on the sales floor instead of out back doing tasks.

Id. ¶ 64. The tasks of "signing," keeping track of inventory and pricing old merchandise were to be assumed by the individual chosen to fill the newly created job of Assistant Store Manager for In-Store Marketing. *Id*. ¶ 66. The new job of Assistant Store Manager for the Home Improvement Department differed most from the old job in its requirement of the skill set dealing with consultative selling skills. Defendant's SMF ¶ 65; James Decl. ¶ 5. The person in that position had to be very focused on developing and coaching others on consultative selling. *Id*.[21]

Preparation for the reorganization included complete assessment of each salaried and supervisory employee, ensuring the store manager was comfortable with the new roles, and identifying employees whose skill sets matched the new job descriptions. Defendant's SMF ¶ 67; Plaintiff's Opposing SMF ¶ 67. The criteria used to determine who received a post-reorganization management position were past performance and a current assessment of the core skills needed for the new job, including "driving results and execution," "change role model," communication, customer focus and personal strengths. Defendant's SMF ¶ 68; Schumm Dep. at 30-31; Schumm Dep. Exh. 5, Attachment No. 8 to Defendant's SMF.[22]

As part of the reorganization, Fournier was responsible for evaluating each salaried manager and hourly supervisor at the South Portland store. Defendant's SMF ¶ 69; Fournier Decl. ¶ 4. As his first step, by July 26, 2001 he did a mid-year 2001 evaluation of each. *Id*.[23] Neither Fournier nor any superior provided Pierce with any mid-year review during the summer of 2001. Plaintiff's Additional SMF ¶ 16;

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[21] Pierce purports to qualify paragraph 65 of the Defendant's SMF, *see* Plaintiff's Opposing SMF ¶ 65; however, her qualification is not supported by the citation given and is on that basis disregarded.

[22] Pierce qualifies this statement, asserting that Fournier stated that sales performance was a huge part of his consideration whether to place a candidate in the new position. Plaintiff's Opposing SMF ¶ 68; Fournier Dep. at 56-57.

[23] Pierce denies this statement on the basis of only one cognizable citation, to her own affidavit. *See* Plaintiff's Opposing SMF ¶ 69; Pierce Decl. ¶ 15. I sustain Sears' objection to her denial on the ground of lack of personal knowledge. *See* Defendant's Reply SMF/Opposing ¶ 69. While it is obvious that Pierce would know whether a mid-year evaluation was communicated to her, she would not necessarily know whether one had taken place, and she lays no foundation for her knowledge that one did not.

Pierce Decl. ¶ 15.[24] Between June and November 2001, Pierce's part of the Home Improvement Department was running so smoothly that Fournier seldom visited or provided direct supervision. Plaintiff's Additional SMF ¶ 18; Pierce Decl. ¶ 16.[25] For the six months Pierce had been a manager, her side of the Home Improvement Department posted a $367,000 sales increase. Plaintiff's Additional SMF ¶ 20; Pierce Decl. ¶ 19.[26] Pierce was one of only two South Portland managers who received an annual incentive bonus in 2001. Plaintiff's Additional SMF ¶21; Pierce Decl. ¶ 37.[27] She received $2,609, which was the maximum bonus allowed under the incentive program. Plaintiff's Additional SMF ¶ 21; Fournier Dep. at 69-72; Fournier Dep. Exh. 1, Attachment No. 5 to Defendant's SMF.[28]

Vachon did not receive a performance bonus in 2001. Plaintiff's Additional SMF ¶ 22; Vachon Dep. at 26. He recalled that his sales numbers for 2001 were at the plan target level only. Plaintiff's Additional SMF ¶ 22; Vachon Dep. at 43.[29] Pierce's side of the Home Improvement Department had a 21.2 percent annual increase, while Vachon's side had a .017 percent annual increase. Plaintiff's Additional SMF ¶ 23; Pierce Decl. ¶ 20. Pierce's sales figures show that she exceeded the sales plan in September by

[24] Sears qualifies this statement, noting that Pierce admitted at deposition that she did not know whether mid-year reviews were conducted. *See* Defendant's Reply SMF/Additional ¶ 16; Pierce Dep. at 47. Pierce further asserts that Sears has provided no documents evidencing that a mid-year review was conducted in 2001, *see* Plaintiff's Additional SMF ¶ 17; however, that statement is disregarded on the basis that it is unsupported by the citation given.

[25] Sears denies this paragraph, *see* Defendant's Reply SMF/Additional ¶ 18; however, I view the cognizable evidence in the light most favorable to Pierce.

[26] Sears denies this paragraph, *see* Defendant's Reply SMF/Additional ¶ 20; however, I view the cognizable evidence in the light most favorable to Pierce.

[27] Sears' objection to this statement on the ground of irrelevance, *see* Defendant's Reply SMF/Additional ¶ 21, is overruled. Sears alternatively denies this statement, *see* Defendant's Reply SMF/Additional ¶ 21; however, I view the cognizable evidence in the light most favorable to Pierce.

[28] Sears' objection to this statement on the ground of irrelevance, *see* Defendant's Reply SMF/Additional ¶ 21, is overruled. Sears alternatively qualifies this statement, asserting that payment was based on the performance of the department, not the manager, that Pierce failed to meet criteria in two of three categories and that the only category she met was Lawn and Garden, which had much success in snowthrower sales (which are largely weather-driven). *See* Defendant's Reply SMF/Additional ¶ 21; Second Fournier Decl. ¶ 21; James Decl. ¶ 8.

[29] Sears' objection to paragraph 22 on the ground of irrelevance, *see* Defendant's Reply SMF/Additional ¶ 22, is overruled. Alternatively, Sears purports to qualify this paragraph, but it fails to articulate its qualification. *See id*.

32 percent, in October by 48 percent, in November by 33 percent and in December by 4.1 percent. Plaintiff's Additional SMF ¶ 23; Exh. F to Pierce Decl.[30]

The year 2001 was one of the best years ever for Home Improvement departments in the district in which the South Portland store is located. Defendant's SMF ¶ 126; James Decl. ¶ 8.[31] In 2001, the weather had a big effect on sales in the district's Home Improvement departments. Defendant's SMF ¶ 127; James Decl. ¶ 8.[32] In March 2001, when James was the District Merchant for Home Improvement and familiar with the sales of the Home Improvement departments of every Sears store in his district, there were several late snowstorms in New Hampshire and Maine. Defendant's SMF ¶ 128; Plaintiff's Opposing SMF ¶ 128. In the first week of March 2001, one storm in Maine dropped a few feet of snow and then, a few days later, another storm dropped another foot or so. Defendant's SMF ¶ 129; James Decl. ¶ 8. As a result, Sears stores in this area, including the South Portland store, sold all of their snow throwers, and there were people who wanted to buy them who could not because they were gone. *Id*. Later in the year, as is typical in retail, as snow throwers first became available in the stores – and even before Sears advertised them in the newspapers – people began buying more snow throwers so that they would not be left out again. *Id*. This continued through the fall and into December. *Id*.[33] Pierce testified at her deposition that

[30] Sears' objection to paragraph 23 on the ground that it is irrelevant, *see* Defendant's Reply SMF/Additional ¶ 23, is overruled. Alternatively, Sears purports to qualify this paragraph, but it fails to articulate its qualification. *See id*.

[31] Pierce purports to qualify this statement, *see* Plaintiff's Opposing SMF ¶ 126; however, Sears' objection that she fails to articulate any qualification, *see* Defendant's Reply SMF/Opposing ¶ 126, is sustained.

[32] Pierce qualifies this statement, asserting that while weather was a factor, her management allowed Sears to capture weather-related sales opportunities. Plaintiff's Opposing SMF ¶ 127; Pierce Decl. ¶¶ 18, 39. Sears' objection to this qualification, *see* Defendant's Reply SMF/Opposing ¶ 127, is more in the nature of a counter-qualification than an objection and is on that basis overruled.

[33] Pierce qualifies paragraph 129 of the Defendant's SMF, asserting that the weather was only one reason for the increased sales. Plaintiff's Opposing SMF ¶ 129; Pierce Decl. ¶¶ 18, 39. Sears' objection to this qualification on the grounds that it offers "no evidence" and should have been set forth as an additional fact, *see* Defendant's Reply SMF/Opposing ¶ 129, is overruled.

factors such as weather and poor prior sales can affects sales figures. Defendant's SMF ¶ 130; Plaintiff's Opposing SMF ¶ 130.

Pierce informed Fournier that she was pregnant in early November 2001. Plaintiff's Additional SMF ¶ 24; Defendant's Reply SMF/Additional ¶ 24.[34] His response was to say, "Congratulations." Defendant's SMF ¶ 107; Plaintiff's Opposing SMF ¶ 107. Pierce had pregnancy-related complications as a result of which she was out of work for one week in November on medical leave. Plaintiff's Additional SMF ¶ 25; Defendant's Reply SMF/Additional ¶ 25.[35] In November 2001, when Fournier sent documents describing the reorganization to managers, Pierce was out on medical leave. Defendant's SMF ¶ 106; Plaintiff's Opposing SMF ¶ 106. He sent her materials to her with a note that said: "Hi Ange. Read this first. Hope you are doing well. We are cheering and praying for you." *Id*. This referred to her pregnancy. *Id*.

In November 2001, prior to the assessment evaluation, Pierce also informed Fournier of her due date. Plaintiff's Additional SMF ¶ 54; Defendant's Reply SMF/Additional ¶ 54. Fournier said that it was good she was not due until after mowing season and that she would look cute trying to start lawnmowers in June. Plaintiff's Additional SMF ¶ 54; Pierce Dep. at 102-04, 163-64. Pierce took these as derogatory comments. *Id*.[36] After Pierce disclosed her pregnancy to Fournier, he started coming in to her department and questioned her ability to perform her job. Plaintiff's Additional SMF ¶ 55; Pierce Dep. at 127-29.[37]

[34] Sears' objection to paragraph 24 on the ground of irrelevance, *see* Defendant's Reply SMF/Additional ¶ 24, is overruled.

[35] Sears' objection to paragraph 25 on the ground of irrelevance, *see* Defendant's Reply SMF/Additional ¶ 25, is overruled.

[36] Sears denies that Fournier made these comments or that Pierce took them as derogatory, *see* Defendant's Reply SMF/Additional ¶ 54; however, I view the cognizable evidence in the light most favorable to Pierce.

[37] Sears denies this statement, *see* Defendant's Reply SMF/Additional ¶ 55; however, I view the cognizable evidence in the light most favorable to Pierce.

Pierce brought Sears a note from her doctor dated November 27, 2001 that said she needed to avoid heavy lifting and could not work more than six hours a day. Defendant's SMF ¶ 108; Plaintiff's Opposing SMF ¶ 108; Defendant's Reply SMF/Opposing ¶ 108. According to Pierce, she had conversations with Fournier about her doctor's notes regarding her need for bed rest and/or limited working hours for her pregnancy, and his response was that she should follow her doctor's orders. Defendant's SMF ¶ 109; Pierce Dep. at 68.[38]

In late November, Fournier told Pierce that she needed to delegate more, but she "said that because of the sales figures being the way that they [were] and we were performing excellently in the department that [she felt it was] not necessary to change [her] style to delegate out anything else that could possibly be done any differently." Defendant's SMF ¶ 38; Pierce Dep. at 53-54.[39]

In early December, and as part of the assessments done for the reorganization, Fournier met with Pierce to discuss her performance. Plaintiff's Additional SMF ¶ 27; Defendant's Reply SMF/Additional ¶ 27. In so doing Fournier used the Sears Performance Review/Associate Development for FLS Sales Managers form ("FLS Form"). *Id*. Fournier states that there were two types of scores. *Id*. ¶ 28. The first derived from business data showing performance and fell under the category of "Results" on the FLS Form. *Id*. These were intended to be objective measures and dealt with 2001 sales data. *Id*. The second type related to "Overall Leadership Skills." *Id*. Finally, a third category titled "Additional Skills" was created for each manager candidate at the first reorganization meeting. *Id*. The scores provided during this initial

[38] Pierce denies this statement, *see* Plaintiff's Opposing SMF ¶ 109; however, I sustain Sears' objection to her denial on the ground that it directly contradicts her prior deposition testimony (without explanation for the discrepancy), *see* Defendant's Reply SMF/Opposing ¶ 109; *Morales*, 246 F.3d at 35; *compare* Pierce Decl. ¶ 27 *with* Pierce Dep. at 68.

[39] Pierce qualifies this statement, asserting that this conversation actually took place in early December, *see* Plaintiff's Opposing SMF ¶ 38, and Sears objects to Pierce's qualification, *see* Defendant's Reply SMF/Opposing ¶ 38. I need not resolve this dispute inasmuch as what matters, for purposes of substantive legal analysis, is whether the conversation (*continued on next page*)

assessment in the areas of Results and Overall Leadership Skills contributed to an overall score later used to establish who would be offered post-reorganization management positions. *Id*. ¶ 29.

In its response to Pierce's Maine Human Rights Commission complaint, Sears stated that Vachon had received a higher score than Pierce and that the managers with the highest scores on these assessments were offered management positions. *Id*. ¶ 30. Fournier claims that he gave Pierce a score of 3 for sales growth because she did not properly factor in maintenance agreements, product protection plans and credit acquisition as part of her net sales. *Id*. ¶ 31. He does not recall what the sales targets for maintenance agreements were. Plaintiff's Additional SMF ¶ 32; Fournier Dep. at 119-21.[40] Vachon and Pierce both received a score of 4 for Results. Plaintiff's Additional SMF ¶ 34; Defendant's Reply SMF/Additional ¶ 34; Fournier Decl. ¶ 4 & Exh. B thereto.[41] Fournier's analyses of Pierce's Results scores were incorrect compared with those he used for Vachon given the differences in actual sales figures between their respective sides of the Home Improvement Department. Plaintiff's Additional SMF ¶ 35; Pierce Decl. ¶ 29.[42]

Fournier raised several leadership issues in his meeting with Pierce. Plaintiff's Additional SMF ¶ 36; Pierce Decl. ¶¶ 22, 26, 28, 31. Issues surrounding delegation and coaching were not raised until after

took place before or after Fournier knew Pierce was pregnant, and it is clear that it took place afterward.

[40] Pierce's further assertions that (i) Sears has produced no documents to show the targets for these categories and whether either Vachon or Pierce met them during the relevant period, *see* Plaintiff's Additional SMF ¶ 32, and (ii) contrary to Fournier's assertions, her results ratings did include all actual sales, including maintenance agreements, product protection plans and credit acquisition, *see id*. ¶ 33, are disregarded on the basis that they are not supported by the citations given.

[41] Sears denies this statement in part, *see* Defendant's Reply SMF/Additional ¶ 34; however, I view the cognizable evidence in the light most favorable to Pierce.

[42] Sears denies this statement, *see* Defendant's Reply SMF/Additional ¶ 35; however, I view the cognizable evidence in the light most favorable to Pierce.

Pierce became pregnant. *Id*. The other issues he brought up were specific issues relating to customer problems that occurred while she was an Assistant Manager, not after she had become a manager. *Id*.[43]

Fournier gave both Vachon and Pierce a score of 3 for Leadership. Plaintiff's Additional SMF ¶ 37; Defendant's Reply SMF/Additional ¶ 37. The Additional Skills section of the FLS Form contained two subsections titled "Driving Results and Execution" and "Customer Focus." *Id*. ¶ 38. Fournier gave Pierce scores of 2 and 3, respectively, in these categories. *Id*. Fournier destroyed his notes regarding his personal observations of Pierce's and Vachon's skills sets. Plaintiff's Additional SMF ¶ 39; Fournier Dep. at 90-91.[44] Fournier agreed there were subjective elements to the five Additional Skills ratings. Plaintiff's Additional SMF ¶ 40; Fournier Dep. at 83-84. Schumm testified that these were subjective ratings provided by the store manager. Plaintiff's Additional SMF ¶ 40; Schumm Dep. at 32.[45] Fournier rated Pierce with respect to Additional Skills. Plaintiff's Additional SMF ¶ 40; Schumm Dep. at 31-32.

Fournier agreed that sales revenues, gross margins and customer service played a considerable role in the "Driving Results" category. Plaintiff's Additional SMF ¶ 41; Fournier Dep. at 79-80. Nonetheless, he scored Pierce with a 2 rating ("marginal") out of a possible 5. Plaintiff's Additional SMF ¶ 41; Fournier Dep. at 78-79.[46] Fournier gave Pierce a 3, or "good," rating for "Customer Focus." Plaintiff's Additional SMF ¶ 42; Defendant's Reply SMF/Additional ¶ 42. Schumm and Fournier had recognized Pierce's superior customer service by letter on four separate occasions. Plaintiff's Additional SMF ¶ 43; Pierce Decl. ¶ 17 & Exh. E thereto; Schumm Dep. at 17-18; Schumm Dep. Exhs. 1-3, Attachment No. 8 to

[43] Sears denies paragraph 36 of the Plaintiff's Additional SMF, *see* Defendant's Reply SMF/Additional ¶ 36; however, I view the cognizable evidence in the light most favorable to Pierce.
[44] Sears purports to qualify this statement, *see* Defendant's Reply SMF/Additional ¶ 39, but its qualification is not supported by the citation given and is on that basis disregarded.
[45] Sears qualifies this statement, noting that Schumm agreed with all of Fournier's ratings regarding Pierce. *See* Defendant's Reply SMF/Additional ¶ 40; Schumm Dep. at 37-38.

Defendant's SMF. She had received many positive customer service remarks. Plaintiff's Additional SMF ¶ 43; Pierce Decl. ¶ 9.[47]

Using the FLS Form, Fournier scored his existing management team as follows: Maureen Doyon, 54, Alicia Dumas, 53, Kevin LaJoie, 53, and Vachon, 52. *Id*. ¶ 46. Those candidates received job offers. *Id*. Pierce received a score of 49. *Id*. Had Pierce received a 5 as her Results score, with no other changes to her scoring, she would have received a 54 on her assessment. Plaintiff's Additional SMF ¶ 47; Exh. B to Fournier Decl. *Id*.[48]

Two meetings were held at a Hampton Inn, one on January 10, 2002 and one on January 16, 2002, so that store managers could present, discuss and possibly slot candidates for the new job descriptions. Defendant's SMF ¶ 78; Fournier Decl. ¶ 7.[49] At the Hampton Inn meetings, each store manager in the district presented and discussed each current manager at his or her store and if and how each such manager could fit into the job matrix created by the reorganization. Defendant's SMF ¶ 79; Plaintiff's Opposing SMF ¶ 79. Before January 10, 2002 Sears' Home Office decided that salaried managers who were not

[46] Sears purports to qualify this statement, *see* Defendant's Reply SMF/Additional ¶ 41, but it fails to articulate its qualification.

[47] Sears qualifies paragraph 43 of the Plaintiff's Additional SMF, asserting that (i) all but one of the commendation letters were written during the time Pierce was an hourly employee or Assistant Manager, (ii) part of her job as a Sales Manager for Lawn and Garden was to coach and train her associates to give excellent customer service, instead of concentrating on doing so herself, (iii) as a manager, she needed to be a coach and mentor to others, and (iv) in the second quarter of 2001 Lawn and Garden, for which she was responsible, got only 33 percent perfect scores on "customer shops," whereas the other departments in other stores in the district got 42 percent, the region got 44 percent, and nationwide the figure was 48 percent. *See* Defendant's Reply SMF/Additional ¶ 43; Second Fournier Decl. ¶¶ 9-10.

[48] Sears' objection to paragraph 47 of the Plaintiff's Additional SMF on the basis that it is a hypothetical that lacks relevance and foundation, *see* Defendant's Reply SMF/Additional ¶ 47, is overruled. In her declaration, Pierce explained that she gave herself a score of 5 for Results based on objective data and the criteria for the "Results BARS" on the FLS Form. *See* Pierce Decl. ¶ 28 & Exh. J thereto. The scoring methodology of the FLS Form is clearly explained on the form itself, permitting one to calculate easily what Pierce's overall score would have been had she been awarded a 5 for Results. *See* Exh. B to Fournier Decl.

[49] Pierce qualifies this statement, *see* Plaintiff's Opposing SMF ¶ 78; however, Sears' objection to her qualification on the ground that it fails to reflect a subsequent agreement between counsel for the parties concerning the date of the Hampton Inn meetings, *see* Defendant's Reply SMF/Opposing ¶ 78; Fournier Dep. at 48, 51, is sustained.

selected for management positions during the reorganization could not have positions that would be demotions. *Id*. ¶ 96.

Because she had been the District General Manager for the Sears district in which the South Portland store was located, Schumm facilitated the Hampton Inn meetings at which store managers presented candidates for the new jobs. *Id*. ¶ 82. The issue of pregnancy was not discussed at any time in regard to anyone at the Hampton Inn meetings. Defendant's SMF ¶ 83; James Decl. ¶ 7. When Pierce worked for Sears, Schumm and Turner did not even know that she was pregnant. Defendant's SMF ¶ 84; Plaintiff's Opposing SMF ¶ 84. James left his position as District General Merchant in October 2001. *Id*. ¶ 85. James cannot remember whether he had heard from Sughrue that Pierce was pregnant as of the time he attended the January 2002 meetings at the Hampton Inn. *Id*. ¶ 86.

A store manager's recommendation for slotting a particular person at his or her store in the district had to be agreed with by Schumm, Turner (then human-resources manager for the district) and James (who had been District Merchant for the district), all of whom attended the meetings. *Id*. ¶ 87. Pierce agreed at her deposition that Turner, James and Schumm would all be familiar with the skill sets necessary for the post-reorganization positions. *Id*. ¶ 105.

At the January 10, 2002 meeting, each Store General Manager in the district, including Fournier, presented his or her recommendations for the Assistant Store Manager positions at his or her store. *Id*. ¶ 88. At that meeting, Fournier stated that he did not feel Pierce should be slotted for the new job at the South Portland store. Plaintiff's Additional SMF ¶¶ 48-49; Defendant's Reply SMF/Additional ¶¶ 48-49. Schumm, Turner and James all agreed with Fournier's decision not to slot Pierce into a new job at the

South Portland store. Defendant's SMF ¶ 90; Schumm Dep. at 47-48; Deposition of Durward Turner ("Turner Dep."), Attachment No. 2 to Defendant's SMF, at 26; James Decl. ¶ 5.[50]

At the Hampton Inn meeting at which Fournier stated that he did not feel Pierce should be slotted into a new job, the consensus of the group was that she was not a great coach, was task-oriented and needed to grow as a manager. Defendant's SMF ¶ 91; Turner Dep. at 20-21; James Decl. ¶ 3; Fournier Decl. ¶ 7.[51] Another reason that Pierce was not slotted for the Assistant Store Manager position was that she had only been a Sales Manager for a portion of a department for a little over six months. Defendant's SMF ¶ 92; Fournier Decl. ¶ 7.

Schumm agreed with the scores Fournier gave Pierce on the five "core skills" needed in the new job description. Defendant's SMF ¶ 94; Schumm Dep. at 37-38. Schumm had seen Pierce occasionally and had never taken her aside or criticized her. Plaintiff's Additional SMF ¶ 50; Schumm Dep. at 11, 16. Schumm could not recall the specifics of any conversations with Fournier about Pierce prior to January 2002. Plaintiff's Additional SMF ¶ 50; Schumm Dep. at 25. Pierce recalled only one conversation with Schumm while she worked in the Home Improvement Department. Plaintiff's Additional SMF ¶ 50; Pierce Decl ¶¶ 35-36.[52]

Turner did not know Pierce and had no comment about her performance. Plaintiff's Additional SMF ¶ 51; Turner Dep. at 14-16. He took notes at the reorganization meeting during the discussion of

[50] Pierce qualifies this statement. *See* Plaintiff's Opposing SMF ¶ 90. The substance of that qualification is set forth in her additional facts, below.
[51] Pierce qualifies this statement. *See* Plaintiff's Opposing SMF ¶ 91. The substance of that qualification is set forth in her additional facts, below.
[52] Sears qualifies paragraph 50 of the Plaintiff's Additional SMF, asserting that Pierce herself testified at her deposition that Schumm was in the store sometimes, and Schumm testified regarding her personal observations and knowledge of Pierce's performance. *See* Defendant's Reply SMF/Additional ¶ 50; Pierce Dep. at 43-44; Schumm Dep. at 13-14, 19-24.

Pierce that were based on others' comments about her. Plaintiff's Additional SMF ¶ 51; Turner Dep. at 26.[53]

James felt that Vachon should get the position of Assistant Store Manager of Home Improvement because he was a natural not only at selling but also at developing and coaching those skills in others – a talent James had observed in him in every department he had worked in. Defendant's SMF ¶ 95; James Decl. ¶ 6. James never provided criticism or evaluation of Pierce. Plaintiff's Additional SMF ¶ 53; Pierce Decl. ¶ 38. He did not interact with her more than three times during the period she was a manager of the Home Improvement Department, and he left the South Portland store in October 2001. *Id*.[54]

On January 14, 2002, Fournier told Pierce that he had a meeting the next day as part of the reorganization and that she needed to get her work restrictions lifted by her physician. Plaintiff's Additional SMF ¶ 56; Pierce Decl. ¶ 32. He stated that her doctors were going to believe anything she said, so she needed to tell them she needed to go back to work full-time with no restrictions. *Id*. When Pierce asked him if that meant her job was in jeopardy if she did not come back to work full-time, he nodded his head affirmatively and walked away. *Id*.[55] Fournier told her to fax her doctor's note to Becky Randall at Human Resources. *Id*.[56] Fournier told her husband that her job was in jeopardy and that she would get "canned." Plaintiff's Additional SMF ¶ 57; Pierce Decl. ¶ 32.[57]

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[53] Sears qualifies paragraph 51 of the Plaintiff's Additional SMF, asserting that Pierce testified that she had worked with Turner when she was a jewelry coordinator and had a good working relationship with him. *See* Defendant's Reply SMF/Additional ¶ 51; Pierce Dep. at 42.

[54] Sears denies paragraph 53 of the Plaintiff's Additional SMF, *see* Defendant's Reply SMF/Additional ¶ 53; however, I view the cognizable evidence in the light most favorable to Pierce.

[55] Although Pierce does not state in the cited portion of her declaration that Fournier "affirmatively" nodded his head, one reasonably can infer this to have been the case. *See* Pierce Decl. ¶ 32 ("Stunned, I asked him if that meant if I didn't get my restrictions lifted would my job be in jeopardy. He nodded and walked out of the office. I took his nod to mean that my job would indeed be in jeopardy.").

[56] Sears' objection to paragraph 56 of the Plaintiff's Additional SMF on the ground of inconsistency in Pierce's various versions of this discussion, *see* Defendant's Reply SMF/Additional ¶ 56, is overruled. While, at her deposition, Pierce

(*continued on next page*)

On January 15, 2002 Pierce saw her physician and told her that she needed her work restrictions lifted or her job was in jeopardy. Plaintiff's Additional SMF ¶ 58; Pierce Decl. ¶ 33. Her physician required her to undergo an ultrasound to determine whether her restrictions could be lifted. *Id*. She received a medical release from those restrictions at the end of her appointment and immediately drove to Sears and hand-delivered the note to Randall. Plaintiff's Additional SMF ¶ 58; Pierce Decl. ¶¶ 33-34.[58] She requested that Randall fax the release to the Newington Sears and get it to Fournier as soon as possible. Plaintiff's Additional SMF ¶ 59; Pierce Decl. ¶ 34.[59] Fournier signed the associate decision form indicating Pierce would be terminated on January 14, 2002. Plaintiff's Additional SMF ¶ 60; Pierce Decl. ¶ 41.[60]

On January 24, 2002 Fournier met with all of the managers of the South Portland store one at a time to tell each whether he or she would be offered a job in the reorganized structure. Defendant's SMF ¶ 98; Plaintiff's Opposing SMF ¶ 98. On that day, Fournier told Pierce and three other managers that they would be offered separation packages. *Id*. ¶ 99. The three other managers offered such packages were one female and two males, at least two of whom had been with Sears longer than Pierce, and all three had more management experience than Pierce. Defendant's SMF ¶ 100; Fournier Decl. ¶ 9. One of the male managers offered a separation package was out on medical leave at the time of the reorganization.

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initially described this encounter differently in some respects, *see* Pierce Dep. at 105-08, she later adopted a description similar to that reflected in paragraph 56, ascribing the discrepancy to the fact that she had gone through quite a lot of paperwork and testimony that day, *see* Pierce Dep. at 165-70. Thus, paragraph 56 is not clearly contradicted by her deposition testimony as clarified. Sears alternatively denies paragraph 56, *see* Defendant's Reply SMF/Additional ¶ 56; however, I view the cognizable evidence in the light most favorable to Pierce.

[57] Sears denies this statement, *see* Defendant's Reply SMF/Additional ¶ 57; however, I view the cognizable evidence in the light most favorable to Pierce.

[58] Sears denies paragraph 58 of the Plaintiff's Additional SMF, *see* Defendant's Reply SMF/Additional ¶ 58; however, I view the cognizable evidence in the light most favorable to Pierce.

[59] Sears denies this statement, *see* Defendant's Reply SMF/Additional ¶ 59; however, I view the cognizable evidence in the light most favorable to Pierce.

Defendant's SMF ¶ 101; Plaintiff's Opposing SMF ¶ 101. In the district in which the South Portland store is located, other managers were out on medical leave during the reorganization, and at least one, Sue Weaver, a female, was offered and accepted a position in the reorganized structure. Defendant's SMF ¶ 104; Fournier Decl. ¶ 9.[61]

Pierce testified that she believes the reason she was terminated was that she was pregnant. Defendant's SMF ¶ 123; Plaintiff's Opposing SMF ¶ 123. Pierce believes she was terminated because of her pregnancy inasmuch as the numbers Fournier gave her on her review were different than the numbers she gave herself. Defendant's SMF ¶ 124; Pierce Dep. at 116.[62]

III. Analysis

In her seven-count complaint, Pierce sues Sears for sex discrimination in violation of federal law (Count I) and state law (Count II), pregnancy discrimination in violation of federal law (Count III) and state law (Count IV), negligence (Count V), intentional infliction of emotional distress (Count VI) and negligent infliction of emotional distress (Count VII). *See* Complaint and Jury Trial Demand ("Complaint") (Docket No. 1) ¶¶ 32-55. Sears notes, and Pierce agrees, that "[i]t is well settled in this District that the analysis of Plaintiff's claims under the Maine Human Rights Act [*i.e.*, Counts II and IV] is the same as the analysis of her federal claims for purposes of summary judgment." Defendant's S/J Motion at 9 n.7; Plaintiff's Opposition to Defendant's Motion for Summary Judgment, etc. ("Plaintiff's S/J Opposition") (Docket No. 24) at 8, 16; *see also, e.g., Davis v. Emery Worldwide Corp.*, 267 F. Supp.2d 109, 118 (D. Me. 2003)

[60] Sears qualifies this statement, noting that Fournier knew after the January 10 meeting that Pierce was going to be offered a separation package. *See* Defendant's Reply SMF/Additional ¶ 60; Fournier Decl. ¶ 8.

[61] Pierce qualifies this statement, noting that Fournier, who was store manager of the South Portland store, was not part of the decision to retain Weaver. Plaintiff's Opposing SMF ¶ 104; Fournier Decl. ¶¶ 2,4, 7.

[62] Pierce qualifies this statement, asserting that this was only one piece of evidence in support of her allegations, and Fournier also made discriminatory remarks regarding her pregnancy. Plaintiff's Opposing SMF ¶ 124; Pierce Dep. at 102, (*continued on next page*)

(in view of parties' recognition that federal law controlled outcome of Maine Human Rights Act ("MHRA") claims, court's discussion of federal claims applied with equal force to state-law claims).

With respect to the majority of Pierce's claims (Counts I, II, V, VI and VII) Sears' entitlement to summary judgment is readily apparent. Pierce all but concedes Sears' victory as concerns her state-law tort claims (Counts V, VI and VII), offering no argument whatsoever in opposition to Sears' bid for summary judgment as regards them and stating that Sears' motion should be denied "as to the majority" of her claims, Plaintiff's S/J Opposition at 1, and – more pointedly – that "the Court should deny Defendant's motion for summary judgment on Plaintiff's state and federal sex and pregnancy discrimination claims[,]" *id*. at 16. As Sears argues, Pierce has waived any objection to its motion for summary judgment as concerns her state-law tort claims. *See* Defendant's Reply to Plaintiff's Opposition to Motion for Summary Judgment ("Defendant's S/J Reply") (Docket No. 26) at 7; *see also, e.g., Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.") (citations and internal quotation marks omitted).

Pierce decidedly does not concede Sears' entitlement to summary judgment with respect to her parallel federal and state sex-discrimination claims (Counts I and II). *See* Plaintiff's S/J Opposition at 16. Nonetheless, Sears' argument for summary judgment in its favor as concerns these claims is simple and compelling. As Sears points out, the gravamen of Pierce's sex-discrimination and pregnancy-discrimination claims is the same: that Sears discriminated against her on the basis of her pregnancy. *See* Defendant's S/J Motion at 16; Defendant's S/J Reply at 6; *see also* Plaintiff's S/J Opposition at 16; Defendant's SMF ¶

104, 127-29. Sears' objection to this qualification on the grounds, *inter alia*, that her statement should have been set (*continued on next page*)

123; Plaintiff's Opposing SMF ¶ 123. Yet, as Sears observes, a pregnancy-discrimination claim is nothing more than a subset of a sex-discrimination claim. *See* Defendant's S/J Reply at 6. Pierce predicates her federal sex-discrimination claim on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), *see, e.g*., Plaintiff's S/J Opposition at 1, 16, which provides, in relevant part:

> It shall be an unlawful employment practice for an employer –
>
> > **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]

42 U.S.C. § 2000e-2(a)(1). She grounds her federal pregnancy-discrimination claim on a portion of Title VII known as the Pregnancy Discrimination Act ("PDA"), *see, e.g*., Plaintiff's S/J Opposition at 8, which provides, in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]

42 U.S.C. § 2000e(k).

In essence, the PDA amended Title VII to ensure that pregnancy discrimination would be considered a form of sex discrimination. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 684 (1983) ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."); *Hunt-Golliday v. Metropolitan Water Reclamation Dist*., 104 F.3d 1004, 1006 (7th Cir.

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forth as an additional fact, *see* Defendant's Reply SMF/Opposing ¶ 124, is overruled.

1997) (describing claims of pregnancy discrimination and sexual harassment as "two subsets of sex discrimination").

Thus, in a case such as this in which a plaintiff's claim of sex discrimination is coextensive with a separate claim of pregnancy discrimination, the latter claim is redundant. *Compare, e.g., Hagen v. Beauticontrol Cosmetics, Inc.*, No. CIV.A.3:98-CV-1199-D, 1999 WL 451228, at *2-*3 (N.D. Tex. June 28, 1999) (in asserting that employer not only discriminated against her because of her pregnancy but also treated females differently than males, plaintiff alleged "separate and distinct claims for sex discrimination and pregnancy discrimination"). Inasmuch as Pierce adduces no evidence of sex discrimination separate and distinct from pregnancy discrimination, Sears is entitled to summary judgment with respect to Counts I and II.[63]

I confront the final, and more difficult, question: whether Pierce adduces sufficient evidence to avoid summary judgment with respect to Counts III and IV, her parallel state and federal claims of pregnancy discrimination. As Pierce acknowledges, *see* Plaintiff's S/J Opposition at 9, a plaintiff suing her employer on a disparate-treatment theory of pregnancy discrimination "bears the burden of showing that her employer purposely took adverse action against her because of her pregnancy[,]" *Davis*, 267 F. Supp.2d at 119. A plaintiff may prove her case by direct and/or circumstantial evidence, *see, e.g., Rathbun v. AutoZone, Inc.*, 361 F.3d 62, 71 (1st Cir. 2004), and Pierce asserts that she can do both, *see, e.g.*, Plaintiff's S/J Opposition at 9-15. As the First Circuit has noted:

> When an employee presents *direct evidence* of [unlawful] discrimination, the employer must then either deny the validity or the sufficiency of the employee's evidence, and have the jury decide whether the employee has proved discrimination by a preponderance of the

[63] As noted above, the parties have agreed that federal law is dispositive of their state-law-based discrimination claims. In any event, the [MHRA] contains wording similar to that of Title VII: "For the purpose of [the MHRA], the word 'sex' includes pregnancy and medical conditions which result from pregnancy." 5 M.R.S.A. § 4572-A(1).

> evidence, or prove that it would have made the same decision even if it had not taken the protected characteristic into account.

Vesprini v. Shaw Contract Flooring Servs., Inc., 315 F.3d 37, 41 (1st Cir. 2002) (citation and internal punctuation omitted) (emphasis in original). When an employee is able to muster direct evidence of unlawful discrimination, "it is more difficult, although not impossible, for the employer to get summary judgment in light of the strength of direct evidence and the potential shifting of burdens." *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 65 (1st Cir. 2002).[64]

"Although its exact contours remain somewhat murky, the term 'direct evidence' normally contemplates only those statements by a decisionmaker that directly reflect the alleged animus and *bear squarely on the contested employment decision*." *Vesprini*, 315 F.3d at 41 (citations and internal punctuation omitted) (emphasis in original). As the First Circuit has advised:

> The high threshold for this type of evidence requires that "mere background noise" and "stray remarks" be excluded from its definition. A statement that can plausibly be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus, and, thus, does not constitute direct evidence. Hence, direct evidence is relatively rare.

Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 (1st Cir. 2002) (citations and internal quotation marks omitted). That said, however, the First Circuit has also cautioned:

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[64] Subsequent to the First Circuit's issuance of the *Vesprini* and *Weston-Smith* decisions, the Supreme Court held that a Title VII plaintiff need not adduce direct evidence to obtain a so-called "mixed motive" jury instruction – in other words, to shift to the employer the burden of proving that it would have made the same decision even if it had not taken the protected characteristic into account. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93 (2003). The Court held that, to obtain such an instruction, a Title VII plaintiff "need only present sufficient evidence" – whether direct or circumstantial – "for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id*. at 101 (internal quotation marks omitted). In this case, however, Pierce argues that her pregnancy-discrimination claim should survive summary judgment on the basis that she has adduced direct evidence of discrimination or, alternatively, that she has set forth an adequate circumstantial case of discrimination pursuant to the classic burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See* Plaintiff's S/J Opposition at 10-11. Inasmuch as she does not invoke *Desert Palace*, I do not consider it.

> Comments which, fairly read, demonstrate that a decisionmaker made, or intended to make, employment decisions based on forbidden criteria constitute direct evidence of discrimination. The mere fact that a fertile mind can conjure up some innocent explanation for such a comment does not undermine its standing as direct evidence. To hold otherwise would be to narrow the definition so drastically as to render the *Price Waterhouse* [*i.e.*, mixed-motive] framework inaccessible to all but the bluntest of admissions. We prefer a more measured approach.

Febres v. Challenger Caribbean Corp., 214 F.3d 57, 61 (1st Cir. 2000) (citations omitted).

Pierce contends that she adduces direct evidence of discriminatory animus in the form of her version of the January 14, 2002 conversation with Fournier in which he allegedly told her to obtain a release of her pregnancy-related work restrictions and fax them to him at the second Hampton Inn meeting the following day, and nodded his head when she asked whether that meant her job was in jeopardy if the restrictions were not lifted. *See* Plaintiff's S/J Opposition at 9-10. She asserts that Fournier made his termination decision "at some point coincident with" this conversation (having signed the transition form that day), and "while she ultimately did get her work restriction lifted, the intent behind this comment and the fact that she was nonetheless terminated show[] that pregnancy was a critical factor in Fournier's decision[.]" *Id*.

Pierce goes on to argue that, while Sears contends it would have promoted Vachon irrespective of her pregnancy, she raises a triable issue of fact whether this was so in view of her evidence that (i) Fournier did not objectively score her in light of her actual sales performance, (ii) Vachon did not have as much managerial experience as she did, (iii) Vachon's sales performance in 2001 was mediocre compared with hers, and he did not receive a bonus while she did, and (iv) Fournier's scoring and criticisms of her were pivotal in the determination not to slot her into the position, given that the district managers who agreed with that decision had little, if any, direct knowledge of her work. *See id*. at 10.

Sears does not address Pierce's argument that if she does hurdle the direct-evidence bar, she adduces sufficient evidence to raise a triable issue of fact as to whether it would have promoted her

irrespective of her pregnancy. *See* Defendant's S/J Reply at 2-3. However, it asserts that Pierce's evidence does not qualify as "direct" inasmuch as (i) Fournier did not admit taking Pierce's pregnancy into account in making the layoff decision, (ii) Pierce herself admitted at deposition that the purported conversation was capable of different meanings, at least one benign, and that she did not really know what Fournier was thinking, (iii) Pierce already was out of the running for the new position prior to the alleged conversation – she herself admits that the termination paperwork was complete as of the same day – and (iv) despite the alleged threat, Pierce was not retained even though she got her work restrictions lifted. *See id*.

As an initial matter, the Pierce deposition evidence on which Sears relies is not cognizable. It was set forth not as an affirmative statement of fact, but rather in the form of an objection to, or alternatively a denial of, Pierce's additional facts. *See* Defendant's Reply SMF/Additional ¶ 56. In any event, I do not find the purported conversation – as described in Pierce's own statement of additional facts – ambiguous in the sense that it is reasonably susceptible of a benign interpretation. Rather, this version of the conversation constitutes direct evidence of a linkup by the key decision-maker between a pregnancy-related condition and the decision not to retain Pierce. *See* 42 U.S.C. § 2000e(k) (PDA proscribes, *inter alia*, discrimination on the basis of medical conditions "related" to pregnancy).

As Pierce posits, the timing is coincident. Regardless whether Fournier actually knew by January 10 that Pierce was no longer in the running, or signed her termination papers prior to their alleged conversation on January 14, the alleged conversation fairly can be said to have occurred during the decision-making process, which officially ended with employee notifications on January 24. A reasonable inference can be drawn in Pierce's favor that the January 14 conversation reflected Fournier's attitude during all relevant periods of that process, including before and after January 14. *Compare, e.g., Vesprini,*

315 F.3d at 41-42 (in case in which alleged remarks were made a year and a half to two years prior to adverse action, the "lack of temporal proximity between these remarks and the ensuing disciplinary action by Shaw severely undermines the reasonableness of any inference that there existed a causal relationship between the remarks and the subsequent decisionmaking by Shaw.").

Finally, I do not think that the alleged discrepancy that Sears highlights – that although Fournier allegedly signaled that Pierce's job was in jeopardy if her job restrictions were not lifted, she was terminated despite complying with the request – undermines the "direct" character of Pierce's evidence. Certainly, the discrepancy bears on credibility. However, crediting Pierce's version of her January 14 conversation with Fournier, as I must for purposes of summary judgment, I conclude that the alleged remarks still meet the definition of "direct evidence": "[c]omments which, fairly read, demonstrate that a decisionmaker *made, or intended to make,* employment decisions based on forbidden criteria[.]" *Febres*, 214 F.3d at 61 (emphasis added).

Inasmuch as Pierce adduces direct evidence of pregnancy-based discrimination, and Sears does not contest that there is a triable issue with respect to a mixed-motive defense under that circumstance, I conclude that Sears has failed to demonstrate its entitlement to summary judgment with respect to Counts III and IV.

That said, in recognition of the murkiness of the contours of the concept of direct evidence, I go on to consider whether, assuming *arguendo* that Pierce failed to adduce such direct evidence, Sears nonetheless would be entitled to summary judgment pursuant to the classic *McDonnell Douglas* burden-shifting test. I conclude that it would not be.

As the First Circuit has clarified:

> Under that [*McDonnell Douglas*] framework, a plaintiff employee must carry the initial burden of coming forward with sufficient evidence to establish a prima facie case of discrimination or retaliation. If he does so, then the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's [termination], sufficient to raise a genuine issue of fact as to whether it discriminated against the employee. . . . If the employer's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case, and the plaintiff retains the ultimate burden of showing that the employer's stated reason for terminating him was in fact a pretext for retaliating against him for having taken protected FMLA leave [or other unlawful discrimination].

Hodgens v. General Dynamics Corp., 144 F.3d 151, 160-61 (1st Cir. 1998) (citations and internal quotation marks omitted). A plaintiff establishes a *prima facie* case of pregnancy discrimination by showing that "(1) she is pregnant (or has indicated an intention to become pregnant), (2) her job performance has been satisfactory, but (3) the employer nonetheless dismissed her from her position (or took some other adverse employment action against her) while (4) continuing to have her duties performed by a comparably qualified person." *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996). Pierce's claims also implicate the paradigm for making out a *prima facie* case of failure to hire, pursuant to which a plaintiff must show that "(1) s/he is a member of a protected class, (2) s/he applied and was qualified for the position in question, (3) that despite his/her qualifications, s/he was rejected, and (4) that, after rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications." *Woods v. Friction Materials, Inc*., 30 F.3d 255, 259 (1st Cir. 1994), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133 (2000).

Sears contends that (i) Pierce cannot make out a *prima facie* case of pregnancy-based discrimination inasmuch as she fails to show that she could adequately perform the position of Assistant Store Manager of Home Improvement, (ii) Sears has shown that it had a legitimate, non-discriminatory reason for bypassing Pierce, and (iii) Pierce adduces no evidence of pretext. *See* Defendant's S/J Motion at 10-16. I am unpersuaded.

A Title VII plaintiff's burden of making out a *prima facie* case has been described as "modest." *Serrano-Cruz v. DFI P.R., Inc.*, 109 F.3d 23, 25 (1st Cir. 1997). I am satisfied that Pierce adduces sufficient evidence to meet that burden as regards her qualification to perform the new assistant-store-manager job. The cognizable evidence, viewed in the light most favorable to Pierce, demonstrates that (i) prior to commencing work at Sears, she had five years' experience managing stores for Claire's, (ii) Claire's considered her a top store manager and gave her a position coaching and training all new managers in her district, (iii) Pierce received high marks as Sughrue's assistant and commendations for customer service, (iv) when Sughrue left, Pierce took over as acting manager of the entire Home Improvement Department – a position she held until the department was split in two in June 2001, (iv) Pierce earned a performance bonus in 2001 while Vachon did not, (v) between June and November 2001, Pierce's side of the department was running so smoothly that Fournier seldom visited or provided direct supervision, (vi) the four candidates with the highest overall FLS Form scores (scores of 54, 53, 53 and 52), including Vachon, received post-reorganization job offers, while Pierce, who received an overall score of 49, did not, (vii) Fournier gave both Pierce and Vachon a score of 4 in the Results category on the FLS Form; however, that analysis, which was supposed to be based on objective criteria, was incorrect given the discrepancy between Pierce's and Vachon's actual sales figures for their respective sides of the Home Improvement Department, and (viii) had Pierce received a score of 5 for Results, with no other changes in her scoring, she would have received an overall score of 54 on the FLS Form.

Sears, like Pierce, handily meets its own burden of showing that it bypassed her for legitimate, non-discriminatory reasons, among them that (i) Pierce had less management experience within Sears than did Vachon, (ii) Vachon had been selected to attend Sears' management-training program while Pierce had not been, (iii) Pierce's section of the Home Improvement Department had an exceptional sales year, and Pierce

received a performance bonus, in large part because the weather in 2001 boosted snow-thrower sales, (iv) Vachon's skill set more closely matched that needed to perform the redesigned job than did that of Pierce – particularly in the areas of coaching and delegation, and (iv) Vachon received a higher FLS Form score than did Pierce – a score Sears denies was incorrectly calculated. *See, e.g., Woods*, 30 F.3d at 261-62 (defendant met burden of showing hiring decision was legitimate when it adduced evidence that it hired the better qualified candidate).

The burden then shifts to Pierce to show that Sears' stated reasons were pretextual. As the First Circuit has observed:

> Satisfying this third-stage burden does not necessarily require independent evidence of discriminatory animus. In a proper case, the trier may infer the ultimate fact of discrimination from components of the plaintiff's prima facie showing combined with compelling proof of the pretextual nature of the employer's explanation. Where, as here, the case arises on the employer's motion for summary judgment, the plaintiff's task is to identify a genuine issue of material fact with respect to whether the employer's stated reason for the adverse employment action was a pretext for a proscribed type of discrimination.

Rathbun, 361 F.3d at 72 (citations omitted).

Pierce surmounts this burden for purposes of summary judgment, adducing evidence that:

1. She was qualified for the new job.

2. Despite James's and Schumm's testimony regarding their concerns about Pierce's coaching and delegation skills prior to November 2001, neither James nor Schumm ever mentioned such concerns contemporaneously to Pierce.

3. Pierce's side of the Home Improvement Department was running so smoothly from June through November 2001 that Fournier – then her direct supervisor – seldom visited or provided direct supervision. In fact, Pierce received a performance bonus for 2001 while Vachon did not.

4. While Fournier states that he performed a mid-year 2001 review of management candidates as his first step in preparing for the reorganization, neither Fournier nor anyone else contemporaneously apprised Pierce of the results of that review.

5. Fournier incorrectly calculated Pierce's FLS Form score. Had Pierce received a 5, rather than a 4, for Results, her overall FLS Form score would have been the same as that of the top-scored candidate and would have exceeded that of Vachon. Candidates with the highest overall FLS Form scores were offered post-reorganization jobs.

6. While Schumm, James and Turner agreed with Fournier's decision, Schumm and James had not had extensive dealings with Pierce, and Turner was not familiar with her work. Fournier's role was pivotal inasmuch as he did the FLS Form scoring and presented the candidates to the others.

7. Although Fournier congratulated Pierce when told she was pregnant, wrote her a note wishing her well while she was out on leave for pregnancy-related complications and told her to follow her doctor's orders, according to Pierce, he also started coming into her department and questioning her ability to perform her job only after learning of her pregnancy. He also allegedly told her that she would look cute trying to start lawnmowers in June, that he was glad she was not due until after mowing season, and, most notably, on the eve of the final Hampton Inn meeting, that she needed to obtain an immediate release of pregnancy-related work restrictions, nodding in response to her query whether her job would be in jeopardy if she did not.

In endeavoring to prove a plaintiff's third-stage *McDonnell Douglas* burden, "many veins of circumstantial evidence may be mined. These include – but are no means limited to – evidence of differential treatment, evidence of discriminatory comments, statistical evidence, and comparative evidence." *Rathbun*, 361 F.3d at 72 (citations and internal quotation marks omitted). The totality of the cognizable

evidence, viewed in the light most favorable to Pierce, would permit a reasonable fact-finder to conclude that Sears' stated reasons for bypassing Pierce were pretextual, and that pregnancy-based discrimination was a motivating factor in the decision.

Inasmuch as Pierce succeeds in demonstrating the existence of trialworthy issues with respect both to her *prima facie* case and her ultimate burden of proving that Sears' stated reasons for its adverse decision were a pretext for pregnancy discrimination, Sears falls short of showing entitlement to summary judgment via the *McDonnell Douglas* burden-shifting paradigm with respect to Counts III and IV.

IV. Conclusion

For the foregoing reasons, I recommend that Sears' motion for summary judgment be **GRANTED** with respect to Counts I, II, V, VI and VII of the Complaint and **DENIED** with respect to Counts III and IV.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of January, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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